91-129

No.

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In The
Supreme Court of the United States

MARGARET DORSEY,
Petitioner,

vs.

THE CITY OF DETROIT, ROBERT BUTUCEL, KENNETH ROBINSON, BRYON GRABER, GWENDOLYN JOHNSON and WILLIAM HART,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

I.

CERTIORARI SHOULD BE GRANTED TO MORE CLEARLY DEFINE THE REQUIREMENTS OF F.R. APP. P. 3(c) AND TO CLARIFY THE SCOPE OF THIS COURT'S HOLDING IN *TORRES* V. *OAKLAND SCAVENGER CO*, 487 U.S. 312 (1988).

II.

CERTIORARI SHOULD BE GRANTED TO DEFINITIVELY ARTICULATE WHETHER ACTIONS BROUGHT PURSUANT TO 42 USC § 1983, WHEN COMMENCED IN THE STATE COURT, ARE SUBJECT TO REMOVAL TO THE FEDERAL COURT OVER THE PLAINTIFF'S OBJECTIONS

PARTIES TO PROCEEDINGS

Petitioner, Margaret Dorsey, is a resident of the City of Detroit. She was the Plaintiff in the trial of this case and was the Appellant before the United States Court of Appeals for the Sixth Circuit.

Respondent City of Detroit is a municipality existing by virtue of the Constitution of the State of Michigan. It was a defendant to the action at trial and was an appellee before the United States Court of Appeals for the Sixth Circuit.

Respondents, Robert Butucel, Kenneth Robinson, Byron Graber, Gwendolyn Johnson and William Hart, were all members of the City of Detroit Police Department on November 22, 1981 of varying rank. Each respondent was a defendant at trial and was an appellee in the matter before the United States Court of Appeals for the Sixth Circuit.

No other party originally named to this action is a party hereto.

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OPINIONS BELOW

On October 4, 1988, the United States Court of Appeals for the Sixth Circuit issued its opinion, affirming in part and reversing in part, the judgment of the District Court. That opinion (A1) was published, *Dorsey* v *City of Detroit, et al*, 858 F.2d 338 (1988).

On November 26, 1990, the United States Court of Appeals for the Sixth Circuit entered its order, dismissing the appeal for lack of jurisdiction (B1).

On April 22, 1991, the United States Court of Appeals for the Sixth Circuit entered its order denying Petitioner's timely

filed Motion for Rehearing, and Suggestion for Rehearing *En Banc* (C1).

SUPREME COURT JURISDICTION

Petitioner seeks review of a portion of the opinion of the United States Court of Appeals for the Sixth Circuit of October 4, 1988.

Petitioner further seeks review of the order of the United States Court of Appeals which dismissed the petitioner's appeal dated November 26, 1990 and the order denying Petitioner's Motion for Rehearing dated April 22, 1991.

Petitioner invokes the certiorari jurisdiction conferred on the Court by 28 USC § 1254(1).

STATUTES AND COURT RULE INVOLVED

42 USC §1983 provides:

Civil Action for Deprivation of Rights.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia".

28 USC § 1441 (a-c) provides:

Actions Removable Generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters in which State law predominates.

Federal Rules of Appellate Procedure 3(c) provides:

Content of the Notice of Appeal

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

STATEMENT OF THE CASE

This action arises from events occurring beginning on the late evening of November 21, 1981, and continuing into the early morning hours of November 22, 1981.

On the evening of November 21, 1981, Robert Dorsey, a house painter by trade, visited the home of a client for the purposes of collecting fees payable to him for recently completed work performed at the house. This client lived on a northbound, one way street, two houses north of the intersection with a major east/west thoroughfare.

After completing his business, Mr. Dorsey drove the short distance south to the east/west artery against the directed flow of traffic, rather than drive around the block to reach the same street. That this act violated the traffic laws, was never disputed by the parties.

Defendants Robinson and Butucel, both officers of the City of Detroit Police Department, saw this traffic offense and attempted to pull Mr. Dorsey over, to issue an appropriate traffic citation.

Dorsey, who lived nearby in a home he shared with his mother, the Plaintiff Margaret Dorsey, a niece and a nephew, however, refused to stop, choosing instead to attempt to flee and elude the police, and thereby avoid being ticketed. This unsuccessful attempt ended on the porch of the Dorsey home. There was never any dispute between the parties that Mr. Dorsey had committed the misdemeanor offense of fleeing and eluding, and could have been legally arrested for this conduct.

It was the events which followed which are in dispute and gave rise to this action.

According to the Plaintiff, she was awakened by the call and frantic pounding of her son at her front door. Robert Dorsey was unable to enter the home because an interior deadbolt lock had been engaged by this mother prior to retiring for the evening. When Plaintiff opened the door,

she saw her son crouched in the doorway with both of the defendant officers approaching the front porch with guns trained upon her son. One officer also had a flashlight pointed in Robert's direction.

Robert Dorsey was ordered by one of the defendants to lay face down on the porch, which he did at his mother's urging. Thereafter both officers came onto the porch, applied their handcuffs and then dragged Mr. Dorsey onto the front walkway leading to the front porch. At this point, according to the Plaintiff, both officers began to severely beat and kick her son, who had posed no threat to the officers, and who was defenseless because of the handcuffs.

Alarmed at what she saw, the Plaintiff pleaded with the defendants not to harm her son. Her pleas, however, fell on deaf ears, as the beating continued without interruption. Plaintiff then approached the defendant Butucel, grabbing his shoulder and again urging him to cease in the beating of her son. At this point, defendant Butucel turned and struck the Plaintiff in the mouth with a flashlight, which had also been used in the beating of Mr. Dorsey.

Mrs. Dorsey was then arrested and charged with interfering with a police officer and was taken to the police station.

Although six of her grandchildren were in her house, (the two who regularly resided with her and four who were visiting) the defendants refused to allow her to make arrangements for their care and supervision. Each of these children were awakened by defendant Johnson, who entered the home without permission and simply awakened them while going from room to room in the house.

There are several operative facts to this incident which are germane to the lawsuit, but are of no significance to the issues presented in this appeal. In the interest of brevity therefore, no further discussion of the events of that evening will be offered.

The action was commenced on May 23, 1984, in the Circuit Court for the County of Wayne, Michigan. At that time

Robert and Margaret Dorsey were named as Plaintiffs, as were Ms. Dorsey's six grandchildren.

On May 29, 1984 the defendants filed their petition for removal of the case to the United States District Court for the Eastern District of Michigan, pursuant to 28 USC §1441.

Plaintiffs' objections to the petition and motion for remand to the Circuit Court were filed on June 7, 1984. This motion was denied on January 10, 1985.

The matter proceeded to trial on January 21, 1986. At the close of Plaintiffs' proofs, the trial court granted defendants' motion for directed verdict with respect to the claims of Margaret Dorsey's grandchildren. Thereafter a verdict of no cause of action was entered with respect to Robert and Margaret Dorsey's claims. Judgment on the Verdict was entered.

Plaintiffs appealed the trial Court's judgment, as well as the pre-trial denial of the motion for remand.

On October 4, 1988, the Court of Appeals handed down its opinion, affirming the trial Court's denial of the motion for remand, and affirming the directed verdict and the judgment of no cause of action with respect to Robert Dorsey's claims. The Court reversed the judgment as to Margaret Dorsey, and remanded her claims for a new trial.

As a result of this decision, Margaret Dorsey became the only remaining Plaintiff. Notwithstanding the deletion of seven Plaintiffs, including Robert Dorsey, the Court and the parties continued to use the original caption of the case, most often in its abbreviated form (Robert Dorsey, et al v. The City of Detroit, et al). The Court was the first to use this abbreviated caption following the appeal, when it issued its December 21, 1988 scheduling order. Following suit, both attorneys utilized the same caption for all subsequent filings.

The matter proceeded to a second trial commencing on November 1, 1989. This trial resulted in a verdict of no

cause of action, in favor of all of the defendants. Judgment on the verdict was entered on November 7, 1989 (D1).

Ms. Dorsey then filed a second appeal on December 5, 1989. The notice of appeal filed utilized the same abbreviated caption, as had been used throughout the proceedings. In her notice of appeal, the Plaintiff specifically referenced the November 7, 1989 Judgment as the order from which the appeal was taken. That judgement named her as the sole non-prevailing party to the 1989 trial.

All of the pre-argument preparation was completed by the parties. Briefs were filed, as was the joint-appendix and the attorneys were prepared to travel to Cincinnati, Ohio for oral argument scheduled for November 26, 1990.

On November 6, 1990, the Court of Appeals on its own motion, directed the parties to file letter briefs, addressing the issue of the Court's jurisdiction in light of *Torres* v *Oakland Scavenger Co.*, 487 US 312 (1988) and *Minority Employees* v *Tennessee Department of Employment Security*, 901 F.2d 1327 (6th Cir. 1990) (*en banc*).

Briefs were then filed by the parties on the question of the Court's jurisdiction.

On November 26, 1990, the Court entered its order dismissing the appeal, finding that the Notice of Appeal filed, did not comply with the requirements of F.R. App. P. 3(c), and as a consequence the court lacked jurisdiction.

Plaintiff filed her Motion for Rehearing and Suggestion for Rehearing *En Banc* on December 7, 1990.

On April 22, 1991 the court entered its order denying the Plaintiff's motion.

Petitioner now seeks the review of this Court.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

CERTIORARI SHOULD BE GRANTED TO MORE CLEARLY DEFINE THE REQUIREMENTS OF F.R. APP. P. 3(c) AND TO CLARIFY THE SCOPE OF THIS COURT'S HOLDING IN *TORRES* v. *OAKLAND SCAVENGER CO*, 487 U.S. 312 (1988).

In dismissing the appeal in this matter, the Court of Appeals relied upon the holding of this Court in *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312 (1988), and its own holding in *Minority Employees* v. *Tennessee Department of Employment Security*, 901 F2d 1327 (6th Cir 1990) (*en banc*). *Minority Employees*, *supra*, was decided after *Torres*, *supra*, and the Court of Appeals, cited *Torres*, *supra*, in support of that holding.

We submit that the facts pertinent to the instant appeal are clearly distinguishable from the pertinent facts in either case relied upon by the Sixth Circuit in its dismissal of the Plaintiff's appeal. As such, we submit that the dismissal of Plaintiff's appeal was clearly erroneous.

Moreover, we think that the Sixth Circuit's holding in *Minority Employees*, *supra*, went well beyond this court's intended interpretation of F.R. App. P. 3(c) as set forth in *Torres*, *supra*, and is, thus, itself an erroneous holding. Regardless of the correctness of this opinion, however, we think that the result in the instant appeal is undeniably erroneous and anomalous.

In *Torres*, *supra*, the petitioner, Jose Torres, was one of 16 plaintiffs who intervened in an employment discrimination suit. That action was dismissed by the trial court pursuant to F.R.Civ. P. 12 (B)(6) on August 31, 1981.

On September 29, 1981 a notice of appeal was filed in the Court of Appeals for the Ninth Circuit. The notice of appeal specifically named 15 of the 16 plaintiffs as appellants. As a

result of a clerical error, Mr. Torres' name was inadvertently omitted from the notice.

The Court of Appeals reversed the District Court's dismissal and remanded the case for further proceedings. (see: *Bonilla* v. *Oakland Scavenger Co.*, 697 F2d 1297 (1982)).

Following remand, the respondent successfully moved for partial summary judgment, asserting that the prior judgment of dismissal was final as to Mr. Torres by virtue of his failure to appeal.

The Court of Appeals affirmed the grant of summary judgment as to Torres.

This Court granted certiorari to resolve a conflict in the circuits over whether a failure to file a notice of appeal in accordance with the specificity requirement of F.R. App. P. 3(c) presents a jurisdictional bar to the appeal.

In its opinion affirming the grant of summary judgment, this Court held that although liberal construction of the rule would permit the "functional equivalent" of a notice of appeal to suffice for the purposes of conferring appellate jurisdiction on the Court of Appeals, that Mr. Torres had not filed a "functional equivalent" of a notice of appeal. This Court stated:

> . . . The purpose of the specificity requirement of Rule 3(c) *is to provide notice* both to the opposition and to the court of the identity of the appellant or appellants . . . Permitting such vague designation would leave the appellee and the court *unable to determine with certitude whether a losing party* not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions. The specificity requirement of Rule 3(c) is met only by *some designation that gives fair notice of the specific individual or entity seeking appeal.* (Emphasis added).

It is abundantly clear from any reading of *Torres*, *supra*, that the most certain way to meet the specificity requirement

of Rule 3(c) is to individually name each appellant taking part in an appeal. However, while this method is exponentially preferable, it is equally clear from a fair reading of *Torres, supra*, that the inclusion of the name of a would be appellant, is not mandatory. The specificity requirements of the rule are satisfied by "some designation" which "provides notice" of identity and intent of the appellant with "certitude". Thus, it is not the failure to specifically name a would be appellant which is fatal. Rather, it is the existence of any ambiguities as to the identity of any would be appellant, or that person's (or entity's) intent to pursue an appeal.

Applying this reasoning to the facts in *Torres, supra*, it is clear that when 15 of the 16 plaintiffs to that action were specifically and individually named in the Notice of Appeal, an ambiguity was immediately created as to the intent of the sixteenth plaintiff, Mr. Torres. He became conspicuous by his absence when his name was not among those who expressed through that notice, their intent to appeal. The ambiguity which existed in *Torres, supra*, resulted from the existence of multiple plaintiffs, whose individual and collective interests were adversely effected by the order of dismissal entered by the District Court. Upon entry of that order 16 people had a right to appeal, and an interest to protect by the pursuit of an appeal. Only 15 of these individuals, however, were named in the notice of appeal. Under these circumstances, it is clear that neither the court nor the opposing party could determine Mr. Torres' intent to appeal from a reading of the notice which did not name him, or otherwise refer to him.

In *Minority Employees, supra*, the Sixth Circuit, sitting *en banc*, was called upon to decide the same issue as was present in *Torres, supra*, under very dissimilar circumstances.

The pertinent facts of that case are as follows:

Minority Employees of the Tennessee Department of Employment Security, Inc., together with three individual plaintiffs brought an action for alleged violations of 42 USC §§ 2000(e) *et seq* and 42 USC §§ 1981, 1983, 1985 and 1988, naming

the State of Tennessee Department of Employment Security, the Department of Personnel and the commissioners of the respective state agencies as defendants.

On March 11, 1988, the United States District Court for the Middle District of Tennessee, granted the defendants' joint motion for summary judgment and dismissed the entirety of the plaintiffs' action.

On April 11, 1988, a notice of appeal was filed which was captioned as follows:

> Minority Employees of the Tennessee Department of Employment Security, et al
> Plaintiffs
>
> vs.
>
> Tennessee Department of Employment Security, et al
> Defendants.

The body of the notice identified the appellants as "plaintiffs in the above case". None of the individual plaintiffs' names appeared in the notice.

After first discussing this Court's holding in *Torres*, *supra*, the majority of a sharply divided Court sitting *en banc*, held that the use of the phrases "et al" within the caption, and "plaintiffs in the above case" within the body of the notice was insufficient designation to satisfy the specificity requirement of Rule 3(c).

The Court rejected the plaintiffs' argument that the notice should be given a "common-sense reading", contending that the phrase "plaintiffs in the above case" was all inclusive, and could only refer to each of the plaintiffs to that action.

The majority opinion, however, focused on the ambiguities inherent in the phrase "et al" after first setting forth its literal translation from the Latin origin. It concluded:

> A court may not look to the intent of the parties to cure the ambiguities inherent in the use of the phrase "et al".

We think that the opinion of Judge Nelson, who concurred in part and dissented, in part, articulated a truer fidelity to "fair notice", "some designation" standard set forth in *Torres*, *supra*.

Judge Nelson wrote:

> The body of the plaintiffs' notice of appeal, to begin with specified the parties taking the appeal as "plaintiffs' in the above case. There can be no possible reason to suppose that the plural form of the noun — "plaintiffs" — was being used here as the functional equivalent of the singular. And because of the plaintiffs' consistent and faithful compliance with another procedural rule, Rule 10(a) of the Federal Rules of Civil Procedure, no one examining the record could have any possible doubt as to who the "plaintiffs in the above case" actually were.

We agree with the majority in *Minority Employees*, *supra*, when it stated that "[a]ny ambiguity will defeat the notice". We submit, however, that in that case, no true ambiguity existed, and the court went at least one step beyond the holding in *Torres*, *supra*, to reach its conclusion.

Whether this court shares our analysis or not with respect to the holding in *Minority Employee*, *supra*, we nonetheless submit that the dismissal of the instant appeal goes several steps beyond the test set forth in *Torres*, *supra*.

First, each case relied upon by the Sixth Circuit involved multiple plaintiffs, all of whom continued to be active parties in their respective suits until the entry of the orders by the respective District courts, and each of whom had standing to appeal as a result of the lower court's orders.

Clearly, the ambiguity created by the omission of Mr. Torres' name in *Torres*, *supra*, was whether or not that plaintiff had abandoned further pursuit of his claims, unlike his 15 co-plaintiffs named in the notice.

Arguably, the ambiguity created in *Minority Employees*, *supra*, was the uncertainty as to which of the "plaintiffs" in that case were exercising their right to appeal.

The presence or absence of an ambiguity, however, is entirely contextual, and when examined in the context of this case, there simply was no ambiguity present.

As a result of the holding of the Court of Appeals in the first appeal, Margaret Dorsey was the only remaining plaintiff at the second trial. When the verdict of the second trial came in against her, she was the only non-prevailing party. When the November 7, 1989 judgment was entered, incorporating the verdict, she was the only person on earth, having standing to appeal that judgment.

Under these circumstances alone, it is difficult to conceive of any inability for the court or the opposing parties to determine with "certitude" who was taking the appeal, notwithstanding the fact that Mrs. Dorsey's name does not appear on the face of the notice.

Furthermore, the Notice of Appeal filed on behalf of Mrs. Dorsey specifically identifies the judgment of November 7, 1989 as the order from which the appeal was taken. In that judgment, Margaret Dorsey is specifically named as the sole non-prevailing party, and was thus the only party named in that order having an appealable interest, thus underscoring the absolute void of any ambiguity as to the identity of the appealing party.

To be sure, the opposing parties never indicated any inability on their part to determine Mrs. Dorsey's intent to pursue an appeal. Their brief was fully written and had been filed. It was the court which raised the issue of jurisdiction only days before the date set for hearing. This then brings us to the second salient distinction this case has from *Torres* and *Minority Employees*.

In the two cases relied upon by the Sixth Circuit in finding no jurisdiction for the instant appeal, the appeals themselves were not barred as a result of the defective notices. Rather, only particular parties were found not to have appealed at all, and were barred from participating in or benefitting from the appeals. Each appeal was decided on the merits.

In the instant action, a notice of appeal was timely filed, indicating someone's intent to appeal. Applying *Torres* and *Minority Employees* rationale, the appeal should have been decided on the merits, and only those parties for which an intent to appeal could not be determined with "certitude", should have been barred from participating.

The Sixth Circuit, however, dismissed the appeal when it held that Margaret Dorsey's right to appeal had not been preserved. In so doing the court demonstrated its ability to determine with "certitude" that Margaret Dorsey was in fact the only appealing party. Had there indeed been some ambiguity about that fact, dismissal would have been inappropriate. Rather only certain parties would have been excluded from participating. By dismissing the appeal, the Court demonstrated its awareness that Margaret Dorsey was the only appellant, and that without her there was no appeal. Thus, her identity and intent were determined with "certitude".

We submit therefore, that there can be no ambiguity about the identity of an appealing party upon the filing of a notice of appeal, when there is but one person who has standing to appeal.

Any holding to the contrary, we submit distorts the "fair notice" "functional equivalent" and "some designation" standards permitted by *Torres*, *supra*.

For this reason we submit that the order of dismissal of the appeal should be reversed and the matter remanded to the Court of Appeals, for disposition of the appeal on the merits.

II.
CERTIORARI SHOULD BE GRANTED TO DEFINITIVELY ARTICULATE WHETHER ACTIONS BROUGHT PURSUANT TO 42 USC § 1983, WHEN COMMENCED IN THE STATE COURT, ARE SUBJECT TO REMOVAL TO THE FEDERAL COURT OVER THE PLAINTIFF'S OBJECTIONS

This action was originally commenced in the United States District Court for the Eastern District of Michigan on November 22, 1983. Following limited discovery, the matter was voluntarily dismissed without prejudice on March 22, 1984.

On May 8, 1984, the suit was re-filed in the Circuit Court for the County of Wayne, State of Michigan.

On May 29, 1984, Defendants filed their petition for removal of the action to the United States District Court pursuant to 28 USC § 1441.

Plaintiff's resultant motion for remand was denied by the District Court, and that denial was affirmed on appeal by the Court of Appeals. (See *Dorsey* v. *City of Detroit*, 858 F.2d 338, 340–341 (6th Cir 1988)).

We submit that this holding was erroneous.

This issue was presented to the Sixth Circuit as a matter of first impression, and so far as our research has revealed the matter has not been addressed at the appellate level in any other circuits. There is, however, conflict on the issue at the District Court level, and prior to the opinion in *Dorsey*, *supra*, a conflict existed amongst the judges of the Eastern District of Michigan.

We think, therefore, that the issue is deserving of this Court's attention and determination as it is an issue of critical importance to Plaintiffs and Defendants alike.

When it enacted 42 USC § 1981 et seq, and specifically § 1983, Congress intended not only to provide its citizens with a remedy for governmental abuses which resulted in

Constitutional violations, it sought to encourage these actions for the benefit of not only the aggrieved citizen, but for society as a whole.

One area in which this intent is evident, is the provision for the recovery of actual costs and attorneys fees in 42 § USC 1988.

The Courts have recognized this intent in several opinions which construe the attorneys fee provision of § 1988. It has been consistently held for example, that attorney fees and costs should be liberally (though not oppressively) awarded in favor of prevailing Plaintiffs, as they serve society as "private attorneys general" when meritorious actions are brought, and their success not only remedies their individual injury, it also serves as a deterrent to other misconduct. (See *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983); *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968); *Ellwest Stereo Theatre, Inc*, v. *Jackson*, 653 F.2d 954 (5th Cir 1981).

Conversely, awards of costs and attorney fees to prevailing defendants have been consistently limited to frivolous actions brought by Plaintiff.

The rationale for this restriction again reflects the Courts' understanding of the Congressional intent. These opinions have all held that awards of costs and fees to prevailing defendants are properly limited, and awarded in only cases of frivolous actions because it would defeat the Congressional intent to make such awards routinely. In these opinions the Courts have correctly reasoned that to fail to restrict these awards to prevailing defendants, would serve to chill the decision of would-be litigants to bring the actions in the first place (see: *Christianburg Garment Co.* v. *E.E.O.C.*, 434 U.S. 412 (1978); *Hughes* v. *Rowe*, 449 U.S. 5 (1980); *Vandenplas* v. *City of Muskego*, 797 F.2d 425 (7th Cir 1986).

We think that it was quite consistent with Congress' intent to encourage these actions, that it conferred concurrent jurisdiction over these actions in the state and federal courts, thereby giving plaintiffs a choice of forum. The Sixth Circuit's

holding on this issue defeats this intent, for it permits defendants to unilaterally veto plaintiff's choice of forum, when that plaintiff elects to bring the action in state court.

We find support for our position in the opinions of some District Courts called upon to pass on this question.

In *Young* v. *Board of Education of Fremont County School Dist., R-3*, 416 F.Supp 1139 (D. Col 1976), the Court stated:

> We see no compelling reason to justify given Defendants, properly sued in a court of competent jurisdiction, the right to select the forum for adjudication of this case. Absent statutory prohibition, *Plaintiff's choice of a forum should be recognized by the Court*. We also observe that the Defendants have not alleged any grounds indicating that they cannot secure a proper defense to this action in state court. (emphasis added).

Similarly, in *Egner* v. *Texas City Independent School District*, 338 F. Supp 931 (S.D. Tx 1972) the Court stated:

> The times must indeed be out of joint when an agency of the state flies headlong into federal court in order to avoid subjecting itself to a federal constitutional adjudication in a court of its own state. Although this court is reluctant to attribute to defendants the base motive of judge-shopping, this would appear to be the only rational explanation for such [an] anomalous procedural maneuver.

When the plaintiff, the party who bears the burden of proof, despite the fact that he or she usually cannot match the resources, nor enjoy the societal presumptions of integrity and honesty as most often are available to his or governmental opponent, cannot maintain the action in the forum he or she perceives as favorable, the incentive to bring the action is chilled, significantly.

It is unfortunate, but true, that palpable distrust and animosity exists in the State of Michigan, for example, between residents and non-residents of the City of Detroit. In many

outstate political campaigns for state office, the winner is often the candidate who makes the most convincing promise to stop spending dollars in Detroit or for its residents. Newspapers from around the state regularly devote much of their editorial space to the ills of the City of Detroit, holding its residents out as the negative example their constituents should seek to avoid mimicking. Recently, a statewide debate has focused on the desirability of placing proposed prisons in locations throughout the state, with many outstate opponents to some proposed sites arguing that Detroit should keep its prisoners within its own boundaries. This narrow view presumes crime does not occur in other parts of the state, that crime is rampant in Detroit, and/or that there is something inherently more repugnant about a criminal from Detroit, as opposed to those who come from other parts of the state.

These attitudes rightly or wrongly exist and are not eliminated by a person's selection to serve as a juror. This is certainly one factor that convinces many plaintiffs, who are also Detroiters, that Federal Court, with its juries coming from a wider geographic territory than a state court's, is a less favorable forum.

Ironically, in the instant case, although the Plaintiff is a Detroiter, the individual defendants are all members of the Detroit Police Department and are Detroit residents, the incident occurred in Detroit, and the City of Detroit itself is a party, the case was tried in Ann Arbor, Michigan. No residents of Detroit were seated as jurors. Indeed, only two residents of the City of Detroit were in the jury pool.

Similarly, as is the case in many police misconduct cases, the plaintiff is black and the majority of the defendants to this action are white. The jury panel had but three black members, with only one being selected as a juror.

These factors and other lead this Plaintiff to believe that the state court was a more favorable forum, than the federal court. This conclusion was reached, not because she believed

that a state court jury would be biased in her favor, but rather because she believed that a jury totally unfamiliar with life in an inner-city would be predisposed to make assumptions consistent with their misperceptions of Detroit residents, their perception of the pervasiveness of crime within the City's boundaries and/or the presumption that Police officers, particularly those of Detroit, have a difficult job and should be supported in their efforts even if they "bend" the rules a little.

There are several other anomalies which have resulted from the now, uniform availability of removal of §1983 actions, in this district.

Several judges in the Eastern District of Michigan have adopted the practice of declining to exercise pendant jurisdiction over State claims alleged in the complaints of removed cases, and have dismissed those claims without prejudice or remanded them to the state courts, thereby forcing the Plaintiff, usually of limited means and resources, to engage in costly piecemeal litigation, or to make an election to abandon either the state or federal claims. (Usually the federal claims in order to return to state court).

Some Plaintiffs, in an effort to avoid removal, at least in the first instance, have filed complaints without asserting federal claims, thereby rendering their complaints ostensibly removal-proof, but reserving their ability to bring federal claims later by way of a separate action, and allowing the first trial to occur in the state court. This is important to some, as it is preferred that the first trial occur in the favorable forum, and then, if successful, to proceed in federal court on the §1983 claims at a later time, with the effect of collateral estoppel on common issues of fact, favoring them rather than working against them.

To counter this, many defendants, particularly the City of Detroit and its officers, frequently invoke state court compulsory joinder rules, seeking to force the plaintiff to bring his or her federal claims, and thereby obtaining a basis for

removal. If the plaintiff declines to join the federal claims, the defendants' consolation prize is a bar to bringing those claims at a later date. Certainly, Congress did not intend to force aggrieved parties to make these sort of tactical decisions.

All of these tactical maneuvers, and others, serve to chill plaintiffs from availing themselves of relief under §1983, in the interest of maintaining their choice of forum, with the belief that they have a better chance to prevail there, than in federal court.

Clearly, this is not what Congress intended when it gave a choice of forum to plaintiffs. If plaintiffs are reluctant to pursue §1983 claims, because to do so usually means a loss of favored forum, then their incentive is chilled and the Congressional intent is defeated.

This Court, in *Fair* v. *Kohler Die & Speciality Co*, 228 U.S. 22 (1913), long ago stated that the plaintiff is the master of his claim, and should be able to choose what law to rely on. With the ability of defendants to control the forum in §1983 actions, this is not possible.

In *Johnson* v. *Butler Bros.*, 162 F.2d 87 (8th Cir 1947), the Eighth Circuit applied an analysis which we think is correct, when it determined the propriety of removal of actions brought under the Fair Labor Standards Act. That Court stated:

> [I]t is our opinion that Congress, in providing that an "action to recover such liability may be maintained in any court of competent jurisdiction . . ." intended not only that the action might be commenced in any court of competent jurisdiction, *but that it could be prosecuted to final judgment in the court in which it was commenced.*
>
> If Congress intended, as we think it did, that causes such as this should not be subject to removal, they are excepted from the effect of the removal statute, which is neither impaired nor repealed with respect to cases which properly come within its purview. (Emphasis added).

We agree.

We submit that this reasoning should be adopted as the law in §1983 cases.

For the foregoing reasons, we submit that certiorari should be granted to resolve the inconsistent approach to this issue.

Respectfully submitted,

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Dated: July 9, 1991

APPENDIX A
OPINION

Robert H. DORSEY, et. al.,
Plaintiffs-Appellants,

v.

The CITY OF DETROIT, et al.,
Defendants-Appellees.

No. 86-1416.

United States Court of Appeals,
Sixth Circuit.

Argued June 9, 1987.
Decided Oct. 4, 1988.

Before WELLFORD, MILBURN, and NELSON, Circuit Judges.

DAVID A. NELSON, Circuit Judge.

This is an action against the City of Detroit and certain of its police officers for allegedly violating the civil rights of a fleeing misdemeanant and his mother. When the mother tried, as she claimed, to prevent the arresting officers from injuring her son in the course of his arrest, she was arrested too. Mother and son contend on appeal that the trial court erred in allowing their case to be removed from a state court and erred in admitting into evidence a police report, highly favorable to the defendants, that the plaintiffs say had been withheld during discovery as part of a deliberate scheme to undermine the mother's testimony. Nondisclosure of the report prejudiced the mother's case, as we see it, but not the son's. We shall remand the mother's claims for a new trial, but affirm the judgment of the district court in all other respects. We are not persuaded that it was error to let the case be removed to federal court.

I

At about 1:30 in the morning on Sunday, November 22, 1981, Detroit Police Officers Butucel and Robinson saw plaintiff Robert Dorsey driving a car without any lights. Mr. Dorsey was going the wrong way on a one-way street. The officers attempted to stop him; he fled, and they gave chase.

Mr. Dorsey drove to the neighborhood where his mother lived. He stopped in front of her house, got out of the car, and ran up to the house. The witnesses differed on what happened next.

Mr. Dorsey testified that as he was banging on the door and calling for his mother, both officers ran up with guns drawn. Officer Butucel shouted "kill him," according to Mr. Dorsey, and both officers "were yelling and screaming at me to lay down." His mother, plaintiff Margaret Dorsey, appeared at the door and told him to lie down on the porch. He did so, and was handcuffed by the officers. Then Officer Robinson allegedly dragged him down the porch steps and started hitting him. Officer Butucel was said to have punched and kicked him in the chest and face with his fists and a flashlight. At this point, according to Mr. Dorsey, his mother went up to the officers and pleaded with them not to kill him. She attempted to hold Officer Butucel back, whereupon he hit her in the mouth with his flashlight. She tried to retreat into her house, but Officer Butucel, shouting profanities, grabbed her and put her in handcuffs.

Other police officers had arrived by then, Mr. Dorsey continued, and they put him in one police car and his mother in another. Officer Butucel took Mr. Dorsey's car keys to move the latter's car, which had been left in the middle of the street—and, according to Mr. Dorsey, the officer proceeded purposely to drive the vehicle into Mrs. Dorsey's parked car. Officer Butucel then returned to Mr. Dorsey, showed him a pipe wrapped in masking tape, and said it had been found in his car. When Mr. Dorsey disclaimed ownership of the pipe, he was beaten with it in the chest. On the

way to the police station, Mr. Dorsey testified, the police car was stopped so that Officer Butucel could beat him again.

Mrs. Dorsey's account of the incident, as far as it went, largely corroborated her son's. The arresting officers, on the other hand, testified that Robert Dorsey vigorously resisted arrest and they merely used reasonable force to subdue him. Officer Butucel testified that as he and Officer Robinson ran toward the house, Mr. Dorsey was at the door with a pipe in his hand. Mr. Dorsey refused to drop it, and the two officers grabbed him by the legs. The three men then tumbled down the porch steps, with Mr. Dorsey kicking and trying to escape. They were on their hands and knees trying to handcuff Mr. Dorsey, who was "biting, kicking, swinging," when Mrs. Dorsey came out of the house and picked up a shovel. She started kicking the officers and swinging the shovel at them, and she hit Officer Butucel in the shoulder with the shovel. He pushed her away, he testified, but she came at him again, and he pushed her a second time. Officer Butucel could not recall whether he was carrying a flashlight, or whether he ever hit Mrs. Dorsey with a flashlight.

A citation filed against Mrs. Dorsey by Officer Butucel after she was arrested made no mention of the shovel; the citation merely said that she "interfere[d] with city official in front of 17852 Fleming in that [she] pushed a police officer, attempting to arrest a suspect in front of that [address]." Officer Butucel testified that he intentionally omitted mention of the shovel so that he would not have to charge Mrs. Dorsey with a felony. Officer Butucel further testified that he discussed the incident with his fellow officers before writing the complaint, and they all felt that Mrs. Dorsey deserved a "break" because of her age and the unusual circumstances surrounding her arrest. A police report written by Officer Butucel after the incident states that Mrs. Dorsey was swinging a shovel, but does not mention her hitting anyone with it. The trial testimony of Officer Robinson, the other arresting officer, corroborated the evidence that Mrs. Dorsey had a shovel, but was equivocal about the use she made of it.

A police sergeant, Byron Graber, arrived on the scene during the excitement. In a report that he prepared on the day of the incident—a report that constitutes the main bone of contention on this appeal—Sergeant Graber summarized what he had been told as follows:

> "The officers grabbed the suspect and as they were leaving the porch a struggle ensued. As the officers were struggling with the man on the ground in order to subdue him, a woman exited 17852 Fleming screaming at the officers, she picked up a shovel and began swinging at the officers. She was ordered to drop the shovel, at which time she did. Then she started to shove the officers who at this time were handcuffing the suspect. Officer Butucel swing his free hand and shoved the woman backwards. She then again charged towards the officers shoving and striking them with her fists. For a second time Officer Butucel pushed her away with his hand and it was at this time they succeeded in handcuffing the suspects."

Sergeant Graber's first-hand observations were set forth thus:

> "When writer arrived at #11, Robert Dorsey was lying on the floor yelling and screaming profanities. He was frothing at the mouth and appeared to be having some type of seizure. Finally he calmed down, he told writer that his ribs hurt because the officers had kicked him. I detected no visible signs of injury. It appeared he had not been drinking. I observed a small abrasion under the right lip of Margaret Dorsey, I inquired how she suffered the injury and she stated the white officer hit her with something hard in her mouth. She stated that when she saw the officers struggling with her son, she came to his assistance, swinging the shovel. She was in night clothing and had not been drinking. I asked her if Robert had ever suffered a seizure before and she stated that he was very 'hyper'. At this time, I ordered both prisoners to the hospital for treatment. Both refused to sign the Medical Release Forms."

Sometime during the early hours of the morning, both Robert Dorsey and his mother were taken to the emergency room of Detroit Receiving Hospital. The hospital records indicate that Robert Dorsey was given valium for gastritis, palpitations, and hyperventilating. There was a notation about an abrasion on his right jaw and a contusion on his left abdomen. Robert Dorsey was reported to have a "nervous condition" and to "answer[ ] 'don't know' to all questions." Mrs. Dorsey's medical report indicates that she was treated for a blow to her chin by a flashlight.

The Dorseys were released from police custody after daybreak. Robert Dorsey was later convicted of attempted fleeing and eluding. Mrs. Dorsey was charged with interfering with a city employee, but her case was dismissed when Officer Butucel failed to appear in court on the date assigned for trial.

II

Plaintiffs (who include grandchildren cared for by Mrs. Dorsey) originally brought suit in federal district court. That action was voluntarily dismissed without prejudice. Plaintiffs later sued in state court, alleging violations of 42 U.S.C. § 1983 and Michigan law. The state court action was removed to federal district court pursuant to 28 U.S.C. § 1441(b) and (c). The plaintiffs contend that the district court erred in declining to send the case back to the state court when asked to do so.

Noting that Congress has allowed § 1983 claims to be maintained in state as well as federal courts, and asserting that "[i]t is well settled that the plaintiff is the master of his claim, and may choose what law to rely on," plaintiffs argue that "where Congress has provided for concurrent jurisdiction in state and federal courts, the claim may be asserted in either court and removal on the basis of federal question jurisdiction is precluded." *Salveson v. Western States Bankcard*

Association, 525 F.Supp. 566, 573 (N.D.Cal.1981) (footnote omitted), *aff'd in part and rev'd in part*, 731 F.2d 1423 (9th Cir.1984); *see also Johnson v. Butler Brothers*, 162 F.2d 87 (8th Cir. 1947); *Jones Store Co., Inc. v. Hammons*, 424 F. Supp. 494, 496–97 (W.D.Mo.1977); *Young v. Board of Education of Freemont County School District, RE–3*, 416 F.Supp. 1139 (D.Colo.1976); *Egner v. Texas City Independent School District*, 338 F.Supp. 931 (S.D.Tex.1972).

Our court has never directly addressed the theory raised by appellants, as far as we have been able to ascertain. Although the theory does have some support in caselaw from other circuits, it is hard for us to reconcile it with the plain words of the pertinent statutes. Congress has said in 28 U.S.C. § 1441(a) that except where otherwise expressly provided by statute, "any" civil action of which the federal district courts have original jurisdiction may be removed. Section 1983 actions are not included among the nonremovable actions listed in 28 U.S.C. § 1445, and no other statute provides, expressly or otherwise, that § 1983 actions are nonremovable. The weight of judicial authority supports the conclusion that "a Congressional grant of concurrent jurisdiction in a statute does not imply that removal is prohibited." 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3729, at 495 (1985); *see Cosme Nieves v. Deshler*, 786 F.2d 445 (1st Cir.), *cert. denied*, 479 U.S. 824, 107 S. Ct. 96, 93 L.Ed.2d 47 (1986); *Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458 (5th Cir.1982); *Whitfield v. Federal Crop Insurance Corp.*, 557 F.2d 413 (4th Cir.1977); *Beckman v. Graves*, 360 F.2d 148 (10th Cir.1966); *Mercy Hospital Association v. Miccio*, 604 F.Supp. 1177 (E.D.N.Y.1985); *Routh v. City of Parkville*, 580 F.Supp. 876 (W.D.Mo.1984); *McConnell v. Marine Engineers Beneficial Association*, 526 F. Supp. 770 (N.D.Cal.1981); *Barrett v. McDonald's of Oklahoma City*, 419 F.Supp. 792 (W.D.Okla.1976); *Sheeder v. Eastern Express, Inc.*, 375 F.Supp. 655 (W.D.Pa.1974); *Hill v. Moss-American, Inc.*, 309 F.Supp. 1175 (N.D.Miss.1970). We agree with the conclusion these cases have reached.

III

A

Following a seven-day trial in the district court, a jury returned a verdict in favor of the defendant police officers. Mrs. Dorsey and her son have appealed the judgment entered on the jury verdict, and they have appealed a directed verdict entered in favor of the city. Mrs. Dorsey's grandchildren have appealed a directed verdict in favor of all defendants on the grandchildren's claims. The plaintiffs' principal claim of error relates to the trial court's decision to let Sergeant Graber's police report be received in evidence despite the defendants' failure to produce it during discovery.

In the initial federal action the plaintiffs served a production request that clearly covered Sergeant Graber's report. The plaintiffs later filed a motion to compel discovery the terms of which also covered Sergeant Graber's report. The defendants agreed, by stipulation, to produce all of the described documents. They had not done so, however, by the time the plaintiffs took a voluntary dismissal of their suit two months later. (The defendants' failure to cooperate in discovery was one of the reasons assigned by the plaintiffs for taking a dismissal; the other was that Mr. Dorsey was unavailable because of his incarceration.)

After the action had been refiled and removed to federal court, the parties appear to have continued with informal discovery on the basis of their earlier understandings and stipulations. The docket of the district court discloses no formal discovery proceedings until the plaintiffs filed a notice for the depositions of the defendants, including Sergeant Graber. A few weeks later, on June 27, 1985, the defendants were served with a request to produce certain police department documents to be described in subpoenas. What happened as a result of that request is not clear, but at some point the plaintiffs were provided copies of the arresting officers' report and other documents. Sergeant Graber's report was not produced; plaintiffs' counsel first learned of its existence

on the morning of the last day when testimony was taken at trial. At that time the report was introduced over objections that it contained inadmissible hearsay and had been improperly withheld during discovery.

Counsel for defendants maintained in his brief on appeal that he had not been obligated to produce Sergeant Graber's report in the present case because the discovery requests made in the original case did not affect this one. (No mention was made of the request for production served on June 27, 1985.) At oral argument, however, defendants' counsel conceded that both parties had proceeded on the basis of the discovery stipulation entered into prior to the voluntary dismissal. Counsel suggested that he was nontheless excused from producing Sergeant Graber's report because it was "unavailable" to him at the time other requested documents were turned over to the plaintiffs.

If the report was temporarily "unavailable" for some reason, we confess ourselves at a loss to understand why defendants' counsel should have supposed that he had no obligation at least to disclose the existence of the report, and to turn it over to plaintiffs' counsel as soon as he could. His failure to discharge that obligation should have led the district court to refuse to let the report be admitted, we believe, even though we do not think the report was inadmissible on hearsay grounds.

As to the hearsay question, Rule 803(6), Fed.R.Evid., provides that although a declarant be available as a witness, the hearsay rule does not exclude

> "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, *or from information transmitted by, a person with knowledge*, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, *all as shown by the testimony of the custodian*

> *or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.* The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." (Emphasis added.)

Plaintiffs advance three reasons why the police report was not properly admitted pursuant to Rule 803(6). First, they argue that no foundation was laid for the introduction of the business record "by the testimony of the custodian or other qualified witness." But Officer Jones, who had worked under Sergeant Graber's supervision, testified that Sergeant Graber prepared such reports in the ordinary course of business, and Jones identified the signature on the report as Sergeant Graber's. See Fed.R.Evid. 901.

Plaintiffs claim that Officer Jones was not a qualified witness because she did not have personal knowledge of what Sergeant Graber did in preparing the report. This claim is unavailing. The rule does not require a qualified witness to have personal knowledge of the making of the business record; "all that is required is that the witness be familiar with the record keeping system." *United States v. Hathaway*, 798 F.2d 902, 906 (6th Cir.1986).

Second, plaintiffs argue that the report contains matter not within the personal knowledge of the report's preparer, such matter being inadmissable "hearsay within hearsay." This argument too is unavailing; Rule 803(6) expressly sanctions the use of "hearsay within hearsay" when it makes admissible records prepared "from information transmitted by" someone with knowledge.

The plaintiffs' third argument is that the report lacks trustworthiness because in it Sergeant Graber "renders his opinion concerning the nature and severity of the injuries suffered by Plaintiffs" and "states his opinions as to the propriety of the Defendants' conduct." In addition to noting that Mr. Dorsey "appeared to be having some type of seizure" and that no

"visible signs of injury" were detected, the report contains these conclusions by Sergeant Graber:

> "The writer's investigation reveals that the officers were engaged in a lawful and proper police function. It is this writer's opinion that Officers Butucel and Robinson used no more than necessary force to effect the arrest of Mr. Dorsey. Officer Butucel appears to have been injured as a result of police action. The alleged injury to Robert Dorsey and the injury to Margaret Dorsey seem minimal under the circumstances. Investigation reveals that both parties were hostile and combative in their actions. The injuries occurred as a direct result of their hostilities towards the officers."

The plaintiffs say these remarks are "self-serving, and invade the province of the jury as [the remarks] rendered conclusive opinions on the ultimate issue of fact to be determined."

The force of this argument is vitiated somewhat by the Notes of the Advisory Committee on the Rules. The Notes explain that "the rule [803(6)] specifically [permits] both diagnoses and *opinions*, in addition to acts, events, and conditions, as proper subjects of admissible entries." (Emphasis added.) The Notes do, however, add these words of caution:

> "The direct introduction of motivation is a disturbing factor, since absence of motivation to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion . . . Yet hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity . . . The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if 'the sources of information or other circumstances indicate lack of trustworthiness.'"

In support of their contention that the circumstances under which Sergeant Graber's report was prepared indicated a lack of trustworthiness, the plaintiffs cite *Bracey v. Herringa*, 466 F.2d 702 (7th Cir. 1972). That case held it was error for a district court, in disposing of a summary judgment motion in a § 1983 action, to consider a report prepared by prison guards:

> "That prison guards may be held accountable under 42 U.S.C. § 1983 for physical beatings of prisoners, deprivation of medical care, or deprivation of hygienic conditions, has been established for enough years that it can safely be assumed at least some guards write their reports on such occurrences with that possibility in mind." 466 F.2d at 704 (footnotes omitted).

Sergeant Graber's report raises motivational questions similar to those that troubled the *Bracey* court. Nevertheless, we believe the district court would have had discretion to admit Sergeant Graber's report if it had been produced during discovery, because production in advance would have enabled plaintiffs' counsel to prepare himself to test its trustworthiness at trial. The defendants' witnesses could have been cross-examined in light of the report, and the jury could have made an informed judgment on how much weight the report deserved. *See Hathaway*, *supra*, 798 F.2d at 907.

In this instance, however, the plaintiffs did not have a fair opportunity to challenge the report's credibility. When the report was finally sprung on them, they could not attack it without recalling witnesses who had testified earlier. They could not interrogate the author of the report, because he had moved to Nevada and they could hardly have deposed him there on the last day of testimony.

Rule 26(e), Fed.R.Civ.P., partially exempts attorneys from having to supplement discovery responses that were complete when made, but it does not remove the burden of providing a complete and accurate response in the first instance. Rule 26(e)(2) imposes a duty seasonably to amend a prior

response if a party obtains information showing that the response was incorrect when made. And, as the Advisory Committee Notes to the 1970 Amendments to Rule 26 state, "[t]his exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney." The failure to provide a key investigative report on the police brutality charges that were the basis of the present lawsuit looks suspiciously like "knowing concealment." In any event, the surprise evidence requires us to consider whether the plaintiffs are not entitled to a new trial.

B

"In order to prevail on this motion for a new trial, plaintiff must show that he was prejudiced and that failure to grant a new trial is inconsistent with substantial justice." *Erskine v. Consolidated Rail Corp.*, 814 F.2d 266, 272 (6th Cir.1987). These tests are met, we believe, in Mrs. Dorsey's case.

The jury could not properly evaluate Mrs. Dorsey's claim without knowing whether she was in fact swinging a shovel at the officers; if she was not, there probably would have been no reason to use any significant force against her. Defense counsel structured his cross examination of Mrs. Dorsey to highlight the inconsistencies between her version and that reflected in the still undisclosed report, thereby enhancing the dramatic impact of the report when it was introduced at the end of the trial. Under the circumstances,we are not prepared to say that counsel's failure to produce the report was unlikely to have made any difference because the report was merely cumulative of what was in Officer Butucel's report.

Sergeant Graber's report did not, however, play a similarly crucial role in Mr. Dorsey's case. It was not he who was supposed to have swung the shovel, and the report did not prejudice him in the way it prejudiced his mother. We do not believe it would be inconsistent with substantial justice to let the judgment against Mr. Dorsey stand.

IV

Plaintiffs also complain that defendants were guilty of misconduct in proffering evidence that Robert Dorsey had been convicted of armed robbery. That the district judge sustained all objections to the attempted character impeachment cannot cure the prejudice plaintiffs suffered, they say, because the "damage was done."

Rule 404(b), Fed.R.Evid., provides:

> "**(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In all of the instances in which the judge sustained plaintiffs' objections, one can point to permissible purposes "other" than character impeachment. We do not believe that defendants acted improperly in attempting to raise the subject of the prior felony conviction.

V

The district court did not err in directing a verdict against the grandchildren. Having reviewed the transcript of the trial, we agree with the district court that there was no evidence that the defendants took any improper action against the grandchildren or that the grandchildren suffered any compensable injury.

VI

Plaintiffs advance two arguments why judgment should not have been entered in favor of the city on the Michigan state law claims. Citing *Ross v. Consumers Power Co.*, 420 Mich. 567, 621, 363 N.W.2d 641, 662 (1984), which says

that a governmental agency "will be held directly liable for its torts if the activity in which it was engaged constituted a non-governmental or proprietary function," plaintiffs contend that the city was engaged in a non-governmental function when, as they claim, its agents intentionally mistreated them. The activity in which the city was engaged, however, was providing police protection to its citizens, and that is a quintessentially governmental activity.

Secondly, plaintiffs argue that the city is vicariously liable for the acts of its police officers. This argument is untenable in light of *Sherbutte v. Marine City*, 374 Mich. 48, 50, 130 N.W.2d 920, 921 (1964) (city cannot be held vicariously liable for torts of its police officers committed during the course of an arrest because the officers were engaged in police activity, which is a governmental function entitled to immunity).

With regard to the § 1983 claim against the city, this case is governed by the following passage from *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978):

> "We conclude . . . that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983."

The plaintiffs in the case at bar failed to present a case comparable to that made out in *Marchese v. Lucas*, 758 F.2d 181 (6th Cir.1985), *cert. denied*, 480 U.S. 916, 107 S.Ct. 1369, 94 L.Ed.2d 685 (1987). In *Marchese*, the court found "official toleration (if not complicity in instigation), of the midnight assault on the part of the command officers on duty at the station house that night; but there was also subsequent concealment followed by a complete failure to initiate

and conduct any meaningful investigation on the part of the Sheriff himself." 758 F.2d at 187–88. There is no evidence in the present case that it was the custom or policy of the City of Detroit to instigate or condone violation of citizens' constitutional rights. On the contrary, the evidence showed that the city has adopted detailed procedures to safeguard citizens' interests during arrests and following complaints of police brutality. There is no suggestion that these procedures were customarily ignored. Plaintiffs' case against the city rested solely on the theory of *respondeat superior*, and the city was clearly entitled to the directed verdict it received.

The judgment against Mrs. Dorsey on her claims against the police officers is REVERSED, and her case is REMANDED for a new trial on those claims only. The judgment against the other plaintiffs is AFFIRMED.

APPENDIX B

No. 89-2420

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT H. DORSEY, ET AL.,
Plaintiffs-Appellants,

v. ORDER

THE CITY OF DETROIT, ET AL.,
Defendants-Appellees.

Before: NELSON and RYAN, Circuit Judges; and LIVELY, Senior Circuit Judge.

On its own motion the court determines that the Notice of Appeal filed herein does not comply with the requirements of Rule 3(c), Federal Rules of Appellate Procedure, and that this court lacks jurisdiction. Accordingly, this appeal is dismissed at the appellant's costs. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *Minority Employees of the Tennessee Dept. of Emp. Sec., Inc. v. State of Tennessee, Dept. of Emp. Sec.*, 901 F.2d 1327 (6th Cir. 1990) (en banc).

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

Filed, Nov. 26, 1990
Leonard Green, Clerk

ISSUED AS MANDATE: May 6, 1991
COSTS: NONE

A TRUE COPY
Attest: Leonard Green, Clerk
By SHARON R. ?ALLAUG?
Deputy Clerk

APPENDIX C

No. 89-2420

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT H. DORSEY, *Plaintiff-Appellant*, MARGARET DORSEY, ET AL., *Plaintiffs*,	)	
v.	)	ORDER
THE CITY OF DETROIT, ET AL., *Defendants*, ROBERT BUTUCEL, OFFICER, ET AL., *Defendants-Appellees*	)	

BEFORE: NELSON and RYAN, Circuit Judges; and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN

Leonard Green, Clerk

FILED
APR 22 1991
LEONARD GREEN, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT H. DORSEY, ET AL.,
Plaintiffs,

vs.

THE CITY OF DETROIT, ET AL.,
Defendants.

Case No.
84-CV-2580-DT
HON.
GEORGE La PLATA

JUDGMENT OF NO CAUSE FOR ACTION

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 29th day of January, 1986.

PRESENT: THE HONORABLE GEORGE La PLATA
United States District Judge

In the above-captioned case, a jury trial, which began on January 16, 1986, concluded in the jury rendering a no cause for action verdict in favor of all Defendants on all counts of the Complaint, against Plaintiffs, Robert Dorsey and Margaret Dorsey, on January 27, 1986.

IT IS HEREBY ORDERED that a no cause for action verdict be entered in favor of Defendants, Robert Butucel, Kenneth Robinson, Gwendolyn Johnson, Paul Kersanty and Byron Graber.

So Ordered.

/s/ GEORGE LA PLATA
GEORGE La PLATA
U.S. District Judge

A TRUE COPY
Clerk, U.S. District Court
Eastern District of Michigan
/s/ K. GLORIO
Deputy Clerk